In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-479

GRACE K. MCFARLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims she was entitled to an administrative hearing on her involuntary retirement from the federal civil service by reason of physical disability.

Petitioner, an accounting technician, began working as an Air Force employee at Patrick Air Force Base in 1951. Between June 12, 1966, and September 12, 1966, petitioner's supervisor recorded five separate incidents of office disturbances occasioned by

petitioner; an earlier disturbance was recorded in November 1964. After another disturbance on February 2, 1967, the Chief, Accounting and Finance Branch, Patrick AFB, directed that petitioner report to the Base Hospital for a medical examination to determine whether she was physically able to continue in her assigned tasks. The report of that examination, conducted by an Air Force Medical Examiner, recommended that petitioner be given a "psychiatric workup for existing personality disorder" (Pet. App. 2a-4a). A psychiatric examination was then conducted on March 23, 1967, by Dr. Adickes, a private physician. Dr. Adickes reported his findings that petitioner evidenced inappropriate and hostile attitudes and concluded that she "has a persecution complex with paranoid delusions prominent enough to create difficulty in maintaining reasonable behavior" (Pet. App. 5a).

Petitioner's supervisor then filed an application under 5 U.S.C. 8337(a) seeking petitioner's retirement for disability.[1] He cited various "instances of emotional instability or abnormal behavior" which had "disrupted the office" (Pet. App. 5a). After petitioner herself refused to apply for disability retirement, the Civil Service Commission's regional medi-

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[1] The Civil Service Retirement Act, 5 U.S.C. 8337, in pertinent part provides:

> (a) An employee who completes 5 years of civilian service and is found by the Civil Service Commission to have become disabled shall be retired on his own application or on application by his agency.

cal officer requested that petitioner be examined by another physician. The second physician, Dr. Parsons, made a diagnosis of "Schizophrenic Reaction, Paranoid Type, With Depressive Trend" (Pet. App. 6a).

After considering the agency's application and supporting documents, the Civil Service Commission's Bureau of Retirement and Insurance determined that petitioner should be retired for physical disability, and on July 20, 1967, advised petitioner of her right to appeal (Pet. App. 6a). In support of her appeal, petitioner adduced the opinion of a third physician, Dr. Geiger, who examined petitioner in August 1967. On October 13, 1967, after reviewing all the evidence, the Civil Service Commission's Board of Appeals and Review upheld the disability determination, and petitioner's disability retirement became effective June 11, 1968 (Pet. App. 6a).

Thereafter, petitioner began an extensive correspondence with the Commission, submitting from time to time reports from psychiatrists and psychologists who had examined her, including a September 24, 1968 letter from Dr. Parsons, stating that his prior single visit with petitioner "was not entirely equitable" and that he saw no reason why petitioner's appeal "should not be considered favorably" (Pet. App. 6a-7a). Petitioner also renewed her request for a hearing. However, after reviewing all of the evidence adduced by petitioner, the Board of Appeals and Review concluded that the new medical evidence

submitted did not warrant an oral evidentiary hearing or the reopening of the case (Pet. App. 7a).

On September 30, 1971, petitioner brought this action against the United States in the Court of Claims, seeking to recover back salary, less appropriate offsets, from and after June 12, 1968, on the ground that her involuntary retirement for physical disability was unlawful. After conducting an evidentiary hearing, the trial judge issued a recommended decision in which he found that the Commission's evaluation of the "mass of medical evidence" before it did not constitute "error going to the 'heart of the administrative determination'" and that petitioner's due process rights were not violated (Pet. App. 10a-13a). The Court of Claims, in a *per curiam* decision, adopted the recommended decision, and dismissed the petition (Pet. App. 1a, 13a).

1. The Court of Claims' decision that due process does not require a full oral evidentiary hearing in cases of involuntary disability retirement has no prospective significance. On June 11, 1968, when petitioner's retirement took effect, neither the Civil Service Retirement Act nor the applicable regulations provided for such a hearing in instances of involuntary disability retirement. However, in 1974 the Civil Service Commission adopted regulations that now provide federal employees with the right to a full evidentiary hearing prior to the Commission's final determination to grant an agency's appli-

cation for disability retirement. 5 C.F.R. 831.1205; 5 C.F.R. 772.307(b).

2. The Court of Claims correctly determined that the Commission's former procedures satisfied due process. Petitioner was accorded notice and opportunity to furnish the Commission with documentary medical evidence in support of her position (Pet. App. 6a), and the Commission's determination was based upon its evaluation of the "mass of medical evidence" before it. Those procedures were all that was constitutionally required to vindicate petitioner's limited interest in continued federal employment.

The Civil Service Retirement Act, which defines a federal employee's interest in continued employment, provides that an "employee who completes 5 years of civilian service and is found by the Civil Service Commission to have become disabled shall be retired on his own application or on application by his agency" (5 U.S.C. 8337(a)), that "[t]he Commission shall determine questions of disability and dependency" (5 U.S.C. 8347(c)), and that "[t]he decisions of the Commission concerning these matters are final and conclusive and are not subject to review" (*ibid.*). The Act makes no provision for an administrative hearing, and the lower federal courts have consistently held that implementation of the involuntary retirement provisions of the Act does not require a full oral evidentiary hearing. *Scroggins* v. *United States*, 397 F. 2d 295, 298 (Ct. Cl.), certiorari denied, 393 U.S. 952; *Chafin* v. *Pratt*, 358 F.2d 349, 355-358 (C.A. 5), certiorari denied, 385 U.S.

878; *Rosenblum* v. *United States Civil Service Commission*, 224 F. Supp. 281, 282 (W.D. Pa.).

In any event, petitioner was accorded a full oral evidentiary hearing in the Court of Claims on the merits of her claim to have been improperly retired, and as that court correctly concluded (Pet. App. 12a):

> The hearing lasted two days. The transcript of testimony covers 436 pages, and 13 witnesses were heard with full right of cross examination given [petitioner]. [Petitioner] herself testified. [Petitioner's] complaint that there was no hearing is certainly satisfied by the hearing afforded before the trial judge.

Thus if, as petitioner believes, this Court's decision in *Arnett* v. *Kennedy*, 416 U.S. 134, requires a hearing at some time in connection with the termination of non-probationary federal employment, that requirement was nevertheless met here.[2]

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[2] The question in *Arnett* v. *Kennedy*, *supra*, concerned the removal of a non-probationary employee for cause under the Lloyd-La Follette Act, 5 U.S.C. 7501. Such a removal is of course very different from an involuntary retirement (*Ellmore* v. *Brucker*, 236 F. 2d 734, 735 (C.A.D.C.), certiorari denied, 352 U.S. 955):

> The [Lloyd-La Follette Act] deals in terms with removal or suspension "for such cause as will promote the efficiency" of the service. An employee who has been placed on an annuity because of medical disability has not been "removed or suspended without pay" and for "cause" within the meaning of the disciplinary provisions of the Lloyd-La Follette Act. The two statutes clearly serve different purposes, and are independently operative in their respective fields.

3. Furthermore, petitioner's claim is barred by laches, in view of her unjustified delay of almost four years in bringing this suit.[3] See *Alpert* v. *United States*, 161 Ct. Cl. 810, 820-821. Petitioner's delay[4] in commencing this action prejudiced the United States in two respects. First, if petitioner were to prevail, the government would have to pay two salaries for a single position, for after her retirement on June 11, 1968, petitioner's position at Patrick AFB was continuously occupied by another employee. See *United States ex rel. Arant* v. *Lane*, 249 U.S. 367, 372; *Grisham* v. *United States*, 392 F. 2d 980, 983 (Ct. Cl.), certiorari denied, 393 U.S. 843. Second, the delay prejudiced the government's ability to defend on the merits.[5]

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[3] In view of its ruling on the merits, the Court of Claims did not find it necessary to reach the question of laches (Pet. App. 1a, 13a).

[4] Petitioner's claim accrued on October 31, 1967, the date on which the Commission's Board of Appeals and Review upheld the disability determination of the Bureau of Retirement and Insurance (Pet. App 6a). Petitioner's subsequent initiation of a series of correspondence with the Commission does not excuse a four-day delay in commencing suit (until September 30, 1971). See *Jones* v. *Summerfield*, 265 F.2d 124, 125 (C.A.D.C.), certiorari denied, 361 U.S. 841.

[5] Dr. Adickes, the psychiatrist who could have been expected to be the government's main witness, died on September 7, 1971, shortly before petitioner's commencement of this suit on September 30, 1971 (Trial Judge's Finding of Fact No. 16(c)). Petitioner's long delay in commencing suit also resulted in the weakening of the government's case at trial due to the dimming of memories (*e.g.*, Transcript of Trial Proceedings, October 10-11, 1972, pp. 98, 403, 406, 415).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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